IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 7, 2007 Session

AMELIA STEWART v. SETON CORPORATION d/b/a BAPTIST HOSPITAL, ET AL.

Appeal from the Circuit Court for Davidson County
No. 05C-3502 Barbara Haynes, Judge

No. M2007-00715-COA-R3-CV - Filed February 12, 2008

This is a premises liability case stemming from a fall by Amelia Stewart over an unpainted curb near one of the entrances to the defendant's hospital. Plaintiff alleges in her complaint that the curb over which the plaintiff fell was unsafe, dangerous and defective. The hospital moved for summary judgment arguing that (1) there was no evidence of an unsafe, dangerous, or defective condition, (2) the condition of the curb was "open and obvious," and (3) that plaintiff could not establish that her injury was foreseeable or the feasibility of alternative conduct. The trial court granted the motion and the plaintiff appealed. We affirm.

Tenn. R. App. P. 3 appeal as of Right; Judgment of the Circuit Court Affirmed

ROSS H. HICKS, SP. J., delivered the opinion of the court, in which ANDY D. BENNETT and D. MICHAEL SWINEY, J., joined.

Thomas Anthony Maynard, Brentwood, Tennessee, for the appellant, Amelia Stewart.

George H. Nolan, Amy D. Hampton, Nashville, Tennessee, for the appellees, Seton Corporation d/b/a Baptist Hospital & St. Thomas Health Services.

OPINION

On or about March 22, 2002, Amelia Stewart ("plaintiff") visited the Baptist North Tower Building premises to see her daughter-in-law who was in labor. Plaintiff had originally visited the emergency room at Baptist Hospital in an attempt to locate her daughter-in-law there or on the obstetrics floor but was directed to the North Tower, a separate building owned and operated by the Hospital. It was approximately ten o'clock at night when the plaintiff exited the Baptist Hospital Emergency Room. She traveled from the emergency room down a sidewalk adjacent to the street connecting the various buildings at Baptist Hospital before crossing over a mulched, landscaped area into a parking lot adjacent to the North Tower. According to the plaintiff, she was "scanning" the

area and "glancing around" as she traveled to the North Tower because it was dark, she did not feel it was a good area of town, and "you don't know who's out." She was also concerned about her newborn grandchild.

After crossing the parking lot, plaintiff walked between parked cars, through an area designated as parking for on call physicians, onto a "dirt embankment".[1] She climbed[2] the embankment toward a canopy covering a driveway designated for patient pickup and drop off. She stepped down off the curb separating the dirt embankment from the driveway and fell sustaining a broken hip as a result of her fall.

Plaintiff testified in her deposition that she was taking the shortest and most direct route that she saw toward the north building and she did not see any other means of accessing the building other than to utilize the embankment leading from the parking lot.

In her complaint, plaintiff alleged that the curb on which she fell was in an "unsafe, dangerous and defective condition" and a "latent and hidden condition which [she] could not see or avoid by reasonable care, skill or diligence." She alleged that the curb on which she fell was approximately three inches high, unmarked, "unpainted" and was the same color as the concrete driveway as well as the adjacent ground. The allegations in the complaint of an "unsafe, dangerous and defective condition" or a "latent and hidden condition" relate solely to the curb itself. The complaint does not refer to the embankment.

The hospital filed this Motion for Summary Judgment on December 22, 2006. As grounds for its motion, the hospital relied upon the absence of genuine issues of material fact in the record to support plaintiff's claims of negligence. Specifically, the hospital alleged it did not have a duty to plaintiff and even if it did, the duty was not breached. The hospital's Motion for Summary Judgment was supported by a Statement of Undisputed Material Facts, a Memorandum of Law, the entire record, plaintiff's deposition testimony and the affidavit of an expert, Jack Potter, Senior Vice-President of Hart, Freeland, Roberts, Inc., architects who had reviewed the area where plaintiff fell. Mr. Potter determined that the curb from which the plaintiff fell was not designed, constructed or placed in an unsafe, perilous, defective or dangerous manner as alleged. The curb was of standard height, color and construction and neither the curb nor its placement violated any building codes or standards. The placement of the curb was necessary and designed to control traffic patterns at the facility, specifically in an area designed for patient pick up and drop off. There is no building code requirement that the curb be painted and the standard of care for design and construction of similar facilities does not require it. The curb over which the plaintiff fell is common in parking lots throughout the Nashville area. The route taken by the plaintiff to access the Baptist North Tower was not intended for use as a pathway or access to the building. The use of the route chosen by the plaintiff required her to cross an area of parking spaces designed for on call physicians. Had vehicles

[1] These words are those chosen by Plaintiff/Appeallant at page 3 and thereafter of her Brief on Appeal. At various places in the record, the parties have referred to the area which plaintiff traversed as an embankment, dirt embankment, hill, little hill, pathway or dirt path.

[2] "After climbing the dirt embankment...". Brief of Appeallant, page 3.

been parked in those spaces at the time of the plaintiff's fall, she would have been required to walk between the vehicles to access the embankment. There were at least two other alternative routes to and means of accessing the building.

Plaintiff's response to the defendant's Motion for Summary Judgment relied upon the plaintiff's affidavit, the deposition of Leon Kelly, the facilities manager at Baptist Hospital at the time of plaintiff's fall, a Response to Defendant's Statement of Undisputed Material Facts, and Memorandum of Law. Plaintiff's responses to the hospital's Statement of Undisputed Material Facts were all undisputed except the following:

12. The curb over which Plaintiff fell had no latent physical, construction or design defects or dangers associated with it. (Potter Aff. ¶ 4.).

RESPONSE:
Disputed. The curb over which plaintiff fell was unpainted therefore the drop off and/or step was unnoticed. (Stewart Aff. ¶ 10-11); (Leon Kelly Depo. 19:7-9 and Exhibit 3); (Kelly Dept. 25:16-23). The condition of the curb as to the issue of design defects or dangers is question of fact for the jury.

13. The curb is one common to parking lots throughout Nashville and of standard height, color and construction. (Potter Aff. ¶ 4.).

RESPONSE:
Disputed for summary judgment purposes. There is no evidence in the record as to what is common to parking lots in Nashville or of the standard height, color or construction of such curbs.

14. The curb complied with all building and other relevant codes (Potter Aff. ¶ 4.).

RESPONSE:
Disputed. There is no evidence of what building or other relevant codes the defendant's expert relies.

Plaintiff admitted (did not dispute) in her Response to Defendant's Statement of Undisputed Facts that "she walked between parked cars to the dirt embankment, despite other means of accessing the building, which [she] claims she did not see" (Response No. 7) and that she was "glancing around" at the time of her fall (Response No. 10).

The deposition of Leon Kelly, the hospital's former facilities manager was taken on behalf of the plaintiff and submitted by plaintiff in opposition to the Motion for Summary Judgment. Mr. Kelly agreed that the curb from which plaintiff fell was not painted and was the same color as the adjacent driveway. He stated that other curbs in the area were painted and that the policy of the hospital was to paint curbs along designated walkways with a high visibility paint. The area where plaintiff fell was not an area designated as a walkway and therefore was not painted. He had never seen anyone crossing the embankment or dirt path from the parking lot to the entrance, had never

used that area as a means of access to the North Tower, did not agree that this was the shortest route to the Tower and described alternative routes which were designated for access to the Tower and were available for plaintiff's use on the date of her fall.

Plaintiff's affidavit established that the curb where the she fell was not painted but that other curbs surrounding the entrance had been painted with either reflective or yellow paint. Plaintiff also stated in her affidavit that the area of the embankment was neither roped off, nor blocked in any way and that there were no warning signs notifying individuals of a drop off or step down from the curb to the driveway or parking surface below. The plaintiff submitted a Statement of Additional Undisputed Facts to establish that the curb on which the plaintiff fell was unmarked and that the concrete used in the driveway and the concrete used in the curb were of the same color. These facts were undisputed by the hospital for purposes of the summary judgment motion. Plaintiff did not submit any additional evidence or proof, by expert affidavit or otherwise that the curb was unsafe, dangerous or defective, relying instead upon argument before the trial court as well as in this appeal, that the "condition of the curb, whether dangerous or not,...is a question for the jury, it is a question of fact." (Brief of Appellant, p. 15).

Although plaintiff's complaint alleged only the unsafe, dangerous and defective condition of the curb from which plaintiff fell and made no reference to the embankment or pathway, plaintiff argued in its reply to the Motion for Summary Judgement:

> The issue is whether Ms. Stewart has made any showing from which it can be determined that the defendants knew or should have known of the probability of an occurrence such as the accident Ms. Stewart sustained due to the condition of their premises. For the plaintiff to prove that the curb was dangerous, she must prove that it was reasonably foreseeable that individuals would utilize a dirt pathway from the parking lot to the North Tower entrance and be subjected to the risk of an unmarked, unpainted curb. The plaintiff would submit that it was reasonably foreseeable that patrons visiting the North Tower would utilize the shortest, most direct route possible to the hospital entrance if approaching in the same direction she utilized the night of March 22, 2002. (Plaintiff's Memorandum of Law in opposition to Defendant's Motion for Summary Judgment, p.3)

This was essentially the same argument made by plaintiff's counsel before the trial court at the hearing on the Motion for Summary Judgment.

On appeal, plaintiff/appellant argues that: A. the trial court erred in granting the summary judgment where disputed facts existed, B. the trial court erred by failing to utilize the proper balancing approach in analyzing hospital's duty to the plaintiff, and C. the trial court erred in considering the issue of notice and the issue of plaintiff's comparative fault in the decision to grant the Motion for Summary Judgment.

STANDARD OF REVIEW

Summary judgments enjoy no presumption of correctness on appeal. *City of Tullahoma vs. Bedford County*, 938 S.W. 2d 408, 412 (Tenn.1997), *McClung vs. Delta Square Ltd. Partnership*, 937 S.W. 2d 891, 894 (Tenn. 1996). We must make a fresh determination as to whether the requirements for summary judgment have been met under Tenn.R.Civ.P. 56. *Hunter vs. Brown*, 955 S.W. 2d 49, 50-51 (Tenn. 1997). When there is no genuine factual dispute with regard to the claim or defense, summary judgment is appropriate if the moving party is entitled to judgment as a matter of law. *Byrd vs. Hall*, 847 S.W. 2d 208 (Tenn. 1993). Courts presented with a summary judgment motion must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in the non-moving party's favor. *Robinson vs. Omer*, 952 S.W. 2d 423, 426 (Tenn. 1997). Accordingly, summary judgment should be granted only when the undisputed facts reasonably support one conclusion–that the moving party is entitled to judgment as a matter of law. *McCall vs. Wilder*, 913 S.W. 2d 150, 153 (Tenn. 1995). Summary judgment must be granted if it is demonstrated that the non-moving party will be unable to prove an essential element of its case. *Byrd*, 847 S.W. 2d at 212-213. The inability to prove an essential element of a claim necessarily renders all other facts immaterial. *Alexander vs. Memphis Individual Practice Association*, 870 S.W. 2d 278, 280 (Tenn. 1993); *Strauss vs. Wyatt, Tarrant, Combs, Gilbert and Milom*, 911 S.W. 2d 727, 729 (Tenn. Ct. App.1995).

ANALYSIS

The essential elements which must be proven in a premises liability case, are: [1] a duty of care owed by the defendant to the plaintiff; [2] conduct by the defendant falling below the standard of care amounting to a breach of the duty; [3] an injury or loss; [4] causation in fact and [5] legal cause. See e.g., *Rice vs. Sabir*, 979 S.W. 2d 305, 308 (Tenn. 1998). "It is a well-settled rule of this State that the mere fact that an injury has been sustained never raises a presumption of negligence." *Mullins vs. Seaboard Coast Line RY. Co.* 517 S.W. 2d 198, 201 (Tenn. Ct. App. 1974).

A. The duty element of a negligence claim requires the court to determine whether the plaintiff is entitled to legal protection at the hands of the defendant. *Bradshaw vs. Daniel*, 854 S.W. 2d 865, 870 (Tenn. 1993). The premises owner owes a general duty to customers or guests to use reasonable care to make its premises safe. *Hudson vs. Gaitan*, 675 S.W. 2d 699 (Tenn.1984). The duty of reasonable care requires that an owner maintain the premises in a generally safe condition by removing or repairing potentially dangerous or defective conditions or by helping customers and guests avoid injury by warning them of the existence of a dangerous or defective condition on the premises of which the owner was or should have been aware. *Blair vs. Campbell*, 924 S.W. 2d 75, 76 (Tenn. 1996). This duty is based upon the assumption that the owner has superior knowledge of a perilous condition on the premises. *Dobson vs. State*, 23 S.W. 3d 324, 330 (Tenn. Ct. App. 1999) (citations omitted); *Ogle vs. Winn-Dixie, Greenville, Inc.*, 919 S.W. 2d 45, 47 (Tenn. Ct. App. 1995). However, the owner of a business is not an insurer of the safety of those visiting the premises. *Smith vs. Inman Realty Co.*, 847 S.W. 2d 819, 822 (Tenn. 1992). It is incumbent upon individuals to exercise an ordinary an reasonable amount of care for their own protection. *Riddell vs. Great Atl. and Pac. Tea Co.*, 241 S.W. 2d 406, 408 (Tenn. 1951). The duty imposed upon a premises owner does not include the responsibility to remove or warrant against conditions for which no unreasonable risk is anticipated or which the owner neither knew about or should have discovered

with reasonable care. *Rice*, 979 S.W. 2d at 309 (Tenn. 1998). A condition will be considered dangerous only if it is reasonably foreseeable that the condition could probably cause harm or injury and that a reasonably prudent property owner would not maintain the premises in such a state. *McCall*, 913 S.W. 2d at 153 (Tenn. 1995). A trier of fact cannot conclude that an owner failed to exercise reasonable care to prevent injury to persons on their property if there is no evidence of a dangerous or defective condition. *Nee vs. Big Creek Partners*, 106 S.W. 2d 650, 654 (Tenn. Ct. App. 2002). The law does not impose a duty on property owners and businesses to use care to maintain areas where it is not reasonably foreseeable that visitors will be present. *Plunk vs. Nat'l Health Investors, Inc.*, 92 S.W. 3d 409, 415 (Tenn. Ct. App. 2002), which refused to hold defendant to a duty of "anticipating that its visitors...might leave the sidewalk and paved surfaces provided for their convenience and venture into the landscaping" (Citations omitted). If injuries of the type that occurred could not have been reasonably foreseen, a duty of care never arises. *Dillard vs. Vanderbilt Univ.*, 970 S.W. 2d 958, 960 (Tenn. Ct. App. 1998).

The issue in this case is whether a perilous or defective condition existed on the hospital premises such that the hospital had a duty to remove or repair the condition or warn plaintiff of its existence. *Blair,* 924 S.W. 2d at 76. Tennessee courts have consistently held that the existence or non-existence of a duty is purely a question of law for the court, *Bradshaw*, 854 S.W. 2d at 870; *Blair*, 924 S.W. 2d at 78; *Rice*, 979 S.W. 2d at 308 and the Tennessee Supreme Court has held that "summary judgment is a proper mechanism with which to evaluate the 'duty' component of a negligence claim..." *Coln vs. City of Savannah,* 966 S.W. 2d 34, 43 (Tenn. 1998).

Plaintiff argues that summary judgment was improper because there are genuine issues of material fact regarding whether the unpainted curb is a defective or dangerous condition. However, plaintiff cites no material facts in the record to support her claim. Plaintiff's responses to defendant's Statement of Undisputed Material Facts do not establish that genuine issues of material fact exist. The Potter affidavit shifted the burden to the plaintiff,

> To set forth specific facts, not legal conclusions by using affidavits or the discovery materials listed in Rule 56.03, establishing that there are indeed disputed, material facts creating a genuine issue that needs to be resolved by the trier of fact and that a trial is therefore necessary. The [plaintiff] may not rely upon the allegations or denials of his pleadings in carrying out this burden...*Byrd*, 847 S.W. 2d at 215.

The hospital's Statement of Undisputed Material Facts cites to the Potter affidavit in establishing that the curb over which the plaintiff fell had no latent physical, construction or design defects or dangers associated with it, that the curb is common to parking lots throughout the area and of standard height, color and construction and that the curb complied with applicable building codes. Plaintiff responds that the curb was unpainted and that she did not notice the drop off, neither of which is disputed, and then argues that the condition of the curb is a question of fact without establishing that a disputed question of fact exists. With regard to other assertions of the Potter affidavit, plaintiff simply argued that there is no evidence in the record, ignoring the direct assertions of the Potter affidavit, which is of course part of the record. Plaintiff simply failed to set forth

specific facts, through use of affidavits or other discovery materials to establish that there is indeed a disputed material fact as required by *Byrd* and its progeny. The hospital therefore successfully negated the duty and breach of duty elements of the plaintiff's claim and the trial court properly granted summary judgment in favor of the hospital.

B. Plaintiff contends that the trial court did not use the proper balancing approach in analyzing the hospital's duty to the plaintiff. "The determination of whether a duty is owed requires a balancing of the foreseeability and gravity of the potential harm against the burden imposed in preventing that harm [citation omitted]. Assuming a duty of care is owed, be it a duty to refrain from creating a danger or a duty to warn against an existing danger, it must then be determined whether a defendant has conformed to the applicable standard of care, which is generally reasonable care under the circumstances." *Coln,* 966 S.W. 2d at 39. To prevail, plaintiff must show that the injury was a reasonably foreseeable probability and that some action within the defendant's power more probably than not would have prevented the injury. *Doe vs. Linden Constr. Co.,* 845 S.W. 2d 173, 178 (Tenn. 1992)..

The trial court was required to perform an analysis of the foreseeability of the risk to which the plaintiff was exposed. The record reflects that the court engaged in such an analysis. The curb over which the plaintiff fell is a common architectural feature in parking lots. There were multiple designated routes to the entrances of the north tower. The dirt embankment chosen by the plaintiff as a route to the building was not intended as a means of access to the building. The hospital had no reason to foresee that the plaintiff would choose to access the building by venturing through parked cars, in an area that was not designated for public parking to "climb" an embankment instead of utilizing the sidewalks and driveways designated for public access. Nor was it foreseeable that the plaintiff would fall off a standard parking lot curb while existing the embankment since that area was not designated as a walkway or means of access to the building.

The trial court properly analyzed the hospital's duty with regard to the foreseeability and gravity of harm. The court determined that there was no evidence that the curb itself was defective, unsafe or dangerous. Plaintiff offered no evidence outside her pleadings and argument that a dangerous condition existed. Although plaintiff did not plead that the dirt embankment she utilized was an unsafe or dangerous condition, she argued that it was reasonably foreseeable that it would be used by the public to access the building. However, she offered no evidence to refute the hospital's proof that the embankment was not intended as a walkway, that multiple routes existed to access the building, that the dirt embankment had ever been used by anyone else or that the hospital knew that it was being used by others or should have anticipated its use by others. There is no evidence that the harm to plaintiff was foreseeable and her claim that foreseeability created a duty on the part of the defendants must fail. Furthermore, there is no evidence that had the curb been painted, plaintiff would have seen it and the outcome have been any different. Plaintiff had departed from the designated walkway, had taken the shortest route she could possibly take and was "glancing around" rather than watching her step when she fell.

We find that the trial court properly analyzed the issue of the hospital's duty based upon the foreseeability and gravity of harm and whether alternative conduct could have prevented the harm.

The plaintiff also asserts that the trial court erred in considering the issues of notice and plaintiff's comparative fault. Having found that the trial court properly determined that there were no genuine issues of material fact with regard to the duty and breach of duty elements of plaintiff's claim, and having determined that the trial court utilized the proper balancing approach in analyzing the hospital's duty to the plaintiff, it is not necessary for this court to address the additional issue raised by the plaintiff.

The judgment of the trial court is affirmed and this case is remanded to the trial court for such further proceedings as may be necessary. Costs of the appeal are assessed against the appellant.

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ROSS H. HICKS, SP. JUDGE